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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1950

BERNARD REALTY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 215

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals For the Seventh Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on May 7, 1951.

OPINIONS BELOW

The opinion of the District Court rendered June 30, 1950 (T 46 R 69) is reported at 805 F. Supp. 92. The opinion of the Circuit Court of Appeals rendered May 7, 1951 (T 71-75) is reported at 188 F. 2d 861.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 7, 1951. (T 71-75) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1251(1).

QUESTION PRESENTED

Whether the purchase price payable by the taxpayer under a Land contract constituted an indebtedness evidenced by a note or certificate of indebtedness for the purpose of computing excess profit tax credit based upon borrowed investment capital within the meaning of Section 719 IRC. 26 U. S. 1946 Ed.

STATUTE INVOLVED

Internal Revenue Code:

Sec. 719 (as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 230 (b) (2) of the Revenue Act of 1942, c. 619, 56 Stat. 798).

BORROWED INVESTED CAPITAL.

(a) Borrowed Capital—The borrowed capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following:

> (1) The amount of the outstanding indebtedness (not including interest) of the taxpayer which is evidenced by a bond, note, bill of exchange, debenture certificate of indebtedness, mortgage, or deed of trust, * * *
>
> * * *

(b) Borrowed Invested Capital.—The borrowed invested capital for any day of any taxable year shall be

* * * an amount equal to 50 per centum of the borrowed capital for such day.
(26 U.S.C. 1946 ed., Sec. 719)

STATEMENT

The petitioner commenced an action against the respondent to recover income taxes allegedly overpaid by reason of the respondent's denying the petitioner the benefits of Section 719 (a) IRC. (T 1-4 R 2-7)

The respondent answered admitting practically all of the allegations of the complaint except denying petitioner was entitled to the benefits of Section 719 (a) IRC. The trial was had upon a stipulation of facts (T 11-14 R 16-18) and some testimony (T 20-21 R 26-28)

The District concluded that the respondent had improperly denied the petitioner the benefits of Section 719 IRC and ordered judgment in favor of the petitioner and against the respondent. (T 46-54 R 69-79)

The respondent appealed to the Court of Appeals for the Seventh Circuit (Tr. 86).

The Court of Appeals reversed the decision of the District Court and held that the respondent had not improperly denied the petitioner the benefits of Section 719 (a) IRC (T 71-75).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the indebtedness evidenced by the land contract was not an indebtedness so to be included as borrowed capital within the meaning of Section 719 (a) (1) IRC.

REASONS FOR GRANTING WRIT

(A) Involves an Important Federal Income Tax Statute

The question herein involves the interpretation of a Federal Income Tax Statute. Although the Statute involved here (Section 719 IRC) has been repealed, a similar Statute has been enacted on January 3, 1951, Section 435 IRC and this question will affect the excess profit tax computation of many corporations and will result in much uncertainty and litigation unless this question is definitely determined by this Court.

Whether an indebtedness under a land contract comes within the Statute should now be decided by this Court so that the Government may be guided in the administration thereof and the taxpayer in compliance with the present excess profits tax law. The Law (Sec. 439 IRC (b) (1) see appendix) now in effect includes now the term "conditional sales contract." It does not mention the term "land contract." Questions will arise as to whether a land contract comes within the term of "conditional sales contract."

The present act, as did the one affecting this case, provides that borrowed capital is an indebtedness evidenced by a note or written evidence of indebtedness. The question will now arise whether an indebtedness under a land contract is the same as under a conditional sales contract.

The question sought to be reviewed here is of wide importance. Many corporations from now on will be met with the question as to whether certain loans, debts or advances borrowed by them constitute borrowed capital under the Revenue Act. There are many forms of contracts and agreements creating and evidencing loans,

debts or finance agreements now used throughout the country all of which may or may not come within the Statute.

Although it would seem relatively simple to determine what does or does not create a definite obligation, nevertheless at the present time there is a difference of opinion between the Commissioner of Internal Revenue, the District Court, and the Circuit Court as to what is or is not a definite obligation. Because of these differences of opinion, the Commissioner and the Courts have drawn fine line distinctions as to differences in the form of agreement and wording, resulting in uncertainty and conflict, so that there is no definite guide to follow.

The interpretation of Section 719 IRC is imperative because of the sharp difference of opinions between the Courts as to what obligations Congress intended to regard as borrowed capital.

The Statute, Section 719, as then worded and the Statute, Section 435, as now worded, seems so all inclusive that many will feel that their obligations, regardless of the special form or contents or conditions, certainly do or should qualify under the Statute, and such opinions will result in continuous litigation until this Court has considered and decided this matter. The question involves the interpretation of a Revenue producing Statute and ought to be settled finally and as speedily as possible so that all parties affected thereby will know the effect of the Statute.

The granting of this Writ affords an opportunity to settle a troublesome question of interpretation of a Statute shortly after its enactment (January 3, 1951) instead of, as is usually the case, interpreting the Statute long after it has been in effect and applied. A decision

at this time will make it possible to apply this statute in conformance with the decision of this Court.

(B) Conflicts with the Decision in Brewster Case vs. Commissioner

The decision of the Court of Appeals here is in conflict with the decision of Brewster Shirt Company vs. Commissioner of Internal Revenue, 159 F. 2nd 227 (2nd Circuit) 35 AFTR 659. In the Brewster case Section 719 (a) (1) IRC came under consideration and the question there was whether a certain factoring agreement and the debt which it created came within this section and qualified as borrowed capital. The Court stated at page 227:

> "The question before us is whether various advances to the taxpayer by its factor Mills Factors Corporation represented "borrowed capital" within the meaning of Section 719 (a) (1) for the purpose of computing its excess profits."

The Brewster case held that money borrowed under a factoring agreement whereby accounts are assigned as security, and under the agreement the taxpayer was liable for any deficiency in the collection of the accounts, that such an agreement constituted an indebtedness under Section 719 (a) IRC, and such indebtedness constituted borrowed capital under Section 719 (a) IRC. The Court held that the factoring agreement qualified under the Statute and stated that to hold otherwise would be construing Section 719 too narrowly and contrary to the intent of Congress. The Court stated at page 229:

> "We think that the decision (Tax Court) interprets the credit allowable under Section 719 for borrowed invested capital too narrowly and was not required by the prior authorities on which it relied."

The Court also held that to deny the taxpayer the benefit claimed would be depriving the taxpayer the very benefit that Congress had intended to extend by enacting the Statute. The Court stated at page 229:

> "We cannot suppose that it was the intention of Congress to subject security given under Factoring Agreements to a form of taxation which would in effect discriminate against those arrangements in favor of secured bank loans, especially when borrowers from Factors are a class frequently least able to bear the burden."

In the Brewster case the Court held that this agreement was sufficient to constitute either a bond, a note, or a certificate of indebtedness under the Statute, because the agreement created a definite obligation even though the amount was not certain. The Court also held that Congress intended to allow a credit for borrowed capital provided the indebtedness was evidenced by a written instrument, and that the statutory requirements were met because the terms of the Statute were sufficiently broad to include most any instrument if it definitely creates an obligation.

The decision, in the Court of Appeals here definitely conflicts with the decision in the Brewster case because the Court held here "that the land contract can not be considered either a note or a mortgage under Section 719 (a) (1) IRC." This decision in effect holds that the contract did not create any obligation on the part of the Bernard Realty Company, which is clearly contrary to the terms of the contract. This contract created an obligation, the same obligation as created by a note. It created a definite obligation to pay, as definite as did the factoring agreement in the Brewster case, 159 F. 2nd 229, which held that a contract creating an obligation to

pay a deficiency was such a contract as met the requirements of the Statute.

In the instant case we have a contract definitely creating an obligation and the Court of Appeals here held that such contract was insufficient to satisfy the Statute, which is in conflict and contrary to the decision in the Brewster case. The Brewster case even held that a contract which creates a definite obligation to pay money comes within the Statute, although there the sum may be indefinite because the obligation depended upon the amount of the deficiency that would arise as result in failure to collect all of the accounts. In the instant case the amount is not indefinite, the obligation is definite as so was the amount.

The decision of the Court of Appeals in this case is in conflict and at great variance with the decision of the Circuit Court of Appeals, Second Circuit, Brewster Case, Supra., and especially so when comparing the agreement in both cases. The agreement in this case creates a stronger obligation than the factoring agreement in the Brewster case. If the factoring agreement in the Brewster case can meet the requirements of the Statute certainly the land contract here meets the requirements of the Statute.

The Court of Appeals in this case does not deny that the land contract creates an obligation, in fact the language of the decision almost admits that it does create an obligation. The Circuit Court of Appeals states as follows: (T 73)

> "* * * The Government urges that this contingency existed throughout the taxable years involved and that the result is that the taxpayer's indebtedness was conditional."

> "In our opinion it is a close question as to whether or not taxpayer's obligation was conditional."

There is no question at all as to the obligation of the taxpayer, there is no conditional obligation here, it is definitely unconditional. In Harris vs. Halverson 192 Wis. 71 at page 77, the Court stated as to the conditional obligation of a land contract and the vendor's and vendee's right:

> "The vendor in a land contract, where the vendee has defaulted, can pursue one of three remedies: first, he may bring an action for strict foreclosure; second, he may bring an action for specific performance; and third, he may bring an action to declare the contract at an end."

By bringing an action for specific performance he then can invoke the obligation against the vendee and recover the purchase price. The option to recover the purchase price or take the property rests with the vendor and not the vendee. The vendor can bring a strict foreclosure, recover the property and get a deficiency judgment for the difference, if any. The vendee is obligated to pay the purchase price if the vendor so chooses to enforce it.

(C) The Decision of the Court of Appeals Must Construe the Obligation of the Vendee Under a Land Contract

The land contract is the equivalent of a note for the purpose of this Statute because it contains the necessary legale requirements of a note. The Uniform Negotiable Instrument Law, Section 184, defines a promissory note as:

> "An unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a certain sum of money to order or payee."

Bouviers Law Dictionary defines a note as follows:

> "A written promise to pay a certain sum of money at a future time unconditionally."

The provisions of the land contract here definitely requires the vendee to pay a fixed sum of money at a future time and meets the requirements of a note. In the case of Aetna Oil Co. vs. Glen, 53 Fed. Sup. 961, the question arose as to whether an agreement constituted an indebtedness under the Revenue Act of 1938 and this Court held that it did in which it stated at page 965:

> "The essential elements of a note appear to be the written unconditional promise to pay another a certain sum of money at a certain time, or at a time which must certainly arrive. No particular form is necessary so long as the instrument embodies these essential characteristics."

The Court further stated in the same case at page 966:

> "In order to constitute a note, the contract must also be in writing signed by the maker and call for the payment of money at a definite time rather than the delivery of goods or performance of services. It is also distinguished from the usual type of bilateral executory contract in that it is executory on one side only, with the entire consideration having been passed."

The Court also stated on page 966 in this case:

> "The use in the statute of the several words "bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust," indicates that no particular type of a written instrument was required so long as the indebtedness was actually evidenced by a written instrument of some type containing the elements of an unconditional promise to pay."

The Court's decision was stated as follows at page 966:

> "Applying such principles to the present case, the Supplemental Agreement upon which the taxpayer relies, containing all of the essential elements of a note, is accordingly held to satisfactorily meet the requirements of the statute.

The land contract imposes a definite obligation upon the purchaser as is clearly evidenced by the terms of the land contract. (Exhibit A—T 14 R 9)

> "Witnesseth: That the vendor has sold and the purchaser has bought for the sum of Three Hundred and Twenty-five Thousand ($325,000.00) Dollars, paid and to be paid at the times and in the manner herein stated * * *"

> "The purchaser shall pay to the vendor at the office of the First Wisconsin Trust Company, Milwaukee, Wisconsin, said purchase price at the times following, to-wit:

> A. Paid concurrently with execution and delivery hereof, $50,000.00.

> B. On or before 10 years after date the balance in installments as follows:

> On the first day of each month beginning April 1, 1943, to and including the first day of March 1950, $1,458.33, aggregating $122,500.00. On or before March 31, 1950, the balance of $152,500.00."

The land contract further provides: (T 17, R 20)

> "* * * and any such failure or neglect of the purchaser shall continue for a period of thirty days; then and in any such case at the vendor's option the entire amount then unpaid under this contract, whether of principal, taxes, assessments, insurance premiums, interest or other obligations whatsoever, shall forthwith on demand become due and payable."

The District Court held that the land contract evidences a debt and stated as follows: (T 50 R 73)

> "Our problem is to determine whether the debt evidenced by the land contract meets the requirements of sec. 719 (a) (1) of the Internal Revenue Code. This statute requires first that there be an indebtedness. The question of what the statute means by the term "indebtedness" was discussed in the case of Aetna Oil Co. vs. Glenn, 53 F. Supp. 961. The court there said:
>
> "The definition of the term includes the essential elements of the existence of an actual liability which must in all events be payable either at that time or at some future time; in other words, an unconditional obligation to pay."

The District Court also stated: (T 50 R 73)

> "It is well established that the obligation of the purchaser to pay the agreed price is definite. Should the purchaser default in his payments, the vendor may, if he chooses, sue the purchaser for the unpaid balance of the purchase price and obtain a judgment for this amount plus accrued interest. Estate of Greenway, 236 Wis. 503."

The District Court stated: (T 53 R 76)

> "In Wisconsin the relation of the parties was described by the courts in early cases as that of equitable mortgagor and mortgagee. This doctrine was oft repeated and became well founded.
>
> Button vs. Schroyer, 5 Wis. 598 and others.
> It has never been reversed."

The District Court further stated that:

> "Considering the position of the purchaser under a land contract and the indebtedness he bears, which is evidenced by the land contract, the court feels that it is wholly proper to hold that for the purposes of Sec. 719 of the Internal Revenue Code this par-

ticular land contract is the equivalent of a mortgage and that the indebtedness may therefore be included in a computation of "borrowed capital."

CONCLUSION

It is submitted that this petition for a writ of certiorari should be granted for the following reasons:

1. The decision of the Court of Appeals is erroneous because it is contrary to the intention of Congress. In enacting the Statute Congress intended to extend the benefit of the borrowed capital credit for all debts that were evidenced by written instruments such as the land contract in this case.

2. That the decision of the Court of Appeals is erroneous and in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in Brewster Shirt Company vs. Commissioner 159 F. 2nd—227.

3. That the question involves the interpretation of the Federal Tax Statute, its application will be of wide importance to many corporations. That the Court should now settle this question so that both the Government and the taxpayer can be guided by the Court's decision.

4. Unless the matter is disposed of at this time and the Statute interpreted much disagreement, contentiousness and litigation will ensue as to the meaning and application of this Statute.

Dated July 23, 1951.

Respectfully submitted,

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APPENDIX

Sec. 439 IRC — BORROWED CAPITAL.

(a) Average Borrowed Capital.—For the purposes of this subchapter the average borrowed capital for any taxable year shall be the aggregate of the daily borrowed capital for each day of such taxable year, divided by the number of days in such taxable year.

(b) Daily Borrowed Capital.—For the purposes of this subchapter, the daily borrowed capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following:

(1) The amount of the outstanding indebtedness (not including interest) of the taxpayer, incurred in good faith for the purposes of the business, which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, deed of trust, bank loan agreement, or conditional sales contract. In the case of property of the taxpayer subject to a mortgage or other lien, the amount of indebtedness secured by such mortgage or lien shall be considered as an indebtedness of the taxpayer whether or not the taxpayer assumed or agreed to pay such indebtedness, plus"